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July 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0213

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

On May 4, 1984 the individual completed a Questionnaire for National Security (QNSP) in which he answered "No" to Question 11 which asks: "Are you now or have you been a user of . . . marijuana . . .?" On his 2003 QNSP and during a June 2004 personnel security interview (PSI), the individual stated that he had used marijuana socially in the 1970's and early 1980's, prior to becoming a DOE contract employee. He also indicated he used marijuana two times in 1985 or 1986 while employed by a DOE contractor.

On April 16, 2004, the Manager of the Personnel Security Department, National Nuclear Security Administration (NNSA), Department of Energy (DOE) issued a Notification Letter to the individual. The Notification Letter was based on the individual's statements that he had used marijuana and failed to properly report his marijuana use on his 1984 QNSP. The Notification Letter finds security concerns under Criterion F (falsification of 1984 QNSP) and Criterion K (use of marijuana in the 1970's and 1980's) 10 C.F.R. §710.8(f) & (k).

In the Notification Letter, the Manager informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the NNSA forwarded this request to the Office

of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

The individual admits the use of marijuana and the failure to report the marijuana use, but suggests three mitigation factors that he believes should form the basis for restoring his access authorization. First, his marijuana use was self reported. Second, he admits that using marijuana was wrong and he has committed to never again using illegal drugs. Third, it has been 20 years since his last marijuana use and his 1984 failure to report that marijuana use. He believes that his co-workers, security file and employment record indicate that since 1986 his behavior has changed and he has been an excellent employee and has been honest and reliable.

At the hearing, the individual testified on his own behalf. He also presented the testimony of three coworkers and an employee assistance program (EAP) counselor. The DOE called a security specialist. A summary of the testimony follows.

II TESTIMONY

A. The Security Specialist

The security specialist testified that the individual's self reporting of his falsification and use of marijuana indicates the individual is "headed in the right direction, as far as being honest and reliable and trustworthy." Tr. at 24. He indicated that self reporting was a mitigating factor for a Criterion F security concern. Tr. at 24.

The security specialist testified that the only falsification indicated in the notification letter was that the individual failed to properly disclose his marijuana use on his 1984 QNSP. However, the security specialist pointed out that the individual failed to properly answer questions on two subsequent QNSPs. Question 24b on the individual's 1990 QNSP asked about marijuana use in the last five years. Tr. at 25. The security specialist testified that the individual's use of marijuana in 1985 or 1986 indicates he should have disclosed marijuana use in response to that question. Tr. at 25. Question 24b on the individual's May 10, 1996 QNSP asked, have you ever used marijuana while possessing an access authorization. The security specialist testified that the individual's marijuana use in 1985/86 should have been disclosed in response to that question. Tr. at 26. The security specialist testified that except for the failure to disclose his marijuana use there is nothing in the individual's security file that would indicate a security concern. Tr. at 30.

B. The Individual

The individual indicated he has not used any illegal substance since 1986. Tr. at 103. He testified that using marijuana while holding an access authorization was wrong and he will not use illegal drugs in the future. Tr. at 103. The individual testified that before he was employed by a DOE contractor, he was a recreational user of marijuana. The two uses of marijuana in 1985 and 1986 soon after he became a contractor employee were chance encounters at which others were smoking

marijuana and passed the cigarette to him. Tr. at 8. He testified that his wife was with him when he smoked marijuana in 1985 and 1986. Tr. at 106. He testified that he has never purchased or sold illegal drugs. Tr. at 9. He testified that he will never again use illegal drugs. Tr. at 104.

The individual testified about his failure to provide accurate information about his marijuana use on his three QNSPs. The individual explained that in 1984 he was afraid that if he answered the question accurately he would have lost his job with the DOE contractor. Tr. at 8. After 1984 he fell into a pattern where he “repeated the falsification.” Tr. at 103. He testified that since 1984 he has felt very guilty for his failure to accurately answer that question. He indicated that his feeling of guilt is the reason that he decided to disclose the marijuana use on his 2004 QNSP. He testified that he will not provide false information on a QNSP in the future. Tr. at 104.

He testified that all of the information about his marijuana use has been self reported and that without his report of the marijuana use the DOE would never have learned that he used marijuana. Tr. at 9. In his twenty years at the DOE, he has never had a security violation. Tr. at 10. He testified that he has an excellent work record. Tr. at 10.

The DOE counsel asked the individual about his family. The individual testified that his daughter, her husband and their daughter live with him and his wife in his home. His wife has recently lost her job, his daughter is in college and his son in law has a low paying job. Tr. at 108. The family is currently concerned that their future income may not be sufficient for the extended family to meet its financial obligations. Because of the family’s concern about their financial future, he indicated he has not told them about the hearing. Tr. at 106. The individual testified that he believes telling his wife about the hearing would cause her great stress, and therefore he will not tell his wife about the hearing. Tr. at 108.

C. The Individual’s Second Level Supervisor

The individual second level supervisor testified that he has known the individual professionally for five years. Tr. at 40 and 44. He believes the individual is honest and has good judgment. Tr. at 42. The individual’s work attendance and character are excellent. Tr. at 44. His performance has been “consistent and steady.” Tr. at 43.

The second level supervisor has never seen any indication that the individual used illegal drugs or had any legal problems. Tr. at 42. He does not believe that the individual is a security risk. Tr. at 43.

D. The Prior Supervisor

The prior supervisor testified that he has known the individual professionally for 10 years. Tr. at 52. Very recently, the individual has been assigned to another work group. Prior to that reassignment he supervised the individual’s work group. Tr. at 53. The prior supervisor testified that he believes the individual’s ability to meet deadlines and achieve goals demonstrates that he is reliable. Tr. at 55. He believes that at the plant the individual is honest, well respected and a good worker. Tr. at 56 and

60. He has never seen an indication of drug use or any other illegal activity. Tr. at 57. He does not believe the individual is a security risk. Tr. at 58. The prior supervisor testified that he does not know the individual socially, and has never met his family. Tr. at 59.

E. Co-Worker

The co-worker has known the individual professionally for 10 years. Tr. at 95. He has socialized with the individual at several work-related dinners and at one party. Tr. at 97. He has met the individual's wife on one occasion. Tr. at 99. The co-worker testified that he believes the individual is honest and reliable. Tr. at 100. The co-worker has never seen any indication that the individual uses illegal drugs. Tr. at 98

F. The Employee Assistance Program (EAP) Psychologist

The EAP counselor has a PhD in psychology. She testified that in December 2004 the individual came to the EAP office seeking counseling service because he was concerned about losing his access authorization. Tr. at 67, 69. She has met with the individual on five occasions. Tr. at 67. During those sessions she saw no indication of larger family or psychological problem. Tr. at 71. During all of their sessions the individual was very engaged and compliant. As an example of his compliance, she testified that the individual willingly followed her recommendation to arrange to have a marijuana hair test. Tr. at 72. The test results were negative, indicating that the individual has not used marijuana in the last 90 days. Tr. at 77.

1. Marijuana use since 1986

The EAP counselor believes the individual's statements that he has not used marijuana since 1986. Tr. at 79. In this regard, she indicated that people who are deceptive become defensive and inappropriately angry. However her evaluation of the individual was that he was anxious and was trying to determine the right thing for his family and the DOE. He also demonstrated substantial remorse for using marijuana, which, in her view, further indicated that he was accurately describing his marijuana use. Tr. at 81.

The EAP counselor does not believe the individual has a substance use or abuse problem. Tr. at 73. She testified that there is a low probability that the individual has used marijuana in the last 10 years. Tr. at 88.

2. QNSP Falsification

The EAP psychologist testified that the individual's failure to be honest about his marijuana use on his QNSPs has weighed on him for a number of years and that he has come forward with the information about his failure in order to deal with his feelings of guilt. Tr. at 72. She believes his decision to come forward is a good indicator that he wants to be honest with the DOE. Tr. at 83. However, she indicated that because the individual is a very private person, it is difficult for him to discuss his problems and concerns. In her view, the individual's willingness to discuss his failure to provide accurate information on his QNSPs indicates he has taken responsibility and is being honest with the DOE. Tr. at 74 & 81.

3. Testimony by Family Members

The EAP counselor testified that the individual told her that the hearing officer and the DOE counsel suggested that the individual have family member testify at the hearing in order to corroborate his statements that he has not used marijuana since 1986. She indicated that the individual was uncomfortable with that approach, and it would cause stress to involve his family members in the hearing process. Tr. at 84. The EAP counselor testified that she "is not sure" whether the individual's wife is aware of the access authorization hearing.¹ Tr. at 89.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to his eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, the individual in these

¹ The EAP counselor testified prior to the individual's testimony that he had not told his wife about the access authorization hearing. Tr. at 89.

cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

It is clear that the individual used marijuana in the 1970's and 1980's and failed to disclose his use on his 1984 QNSP. It is also clear that the individual used marijuana in 1985 and 1986 while holding an access authorization. These actions clearly created a falsification security concern under Criterion F and a concern relating to the use of illegal drugs under Criterion K.

A. Criterion F

As noted above, the individual testified that he feels remorse for his failure to accurately disclose his drug use on his 1984 and subsequent QNSPs. He stated that he will provide accurate information to the DOE in the future. He presented testimony that he has been a good employee and worker for over twenty years, and he believes that I should find that his failure to disclose his marijuana use does not indicate that he will withhold information in the future. I do not find these assurances and the general evidence of his good employment record to mitigate the security concern.

First, I note the individual has a pattern of not providing accurate information on three QNSPs. In spite of his testimony to the contrary, I am not convinced that his attitude about providing accurate information has changed. For example, the individual was not completely candid about his willingness to call his wife as a witness. During the pre-hearing conference the DOE counsel urged the individual to call family and friends to corroborate his testimony regarding his marijuana use since 1986. During that discussion of calling family members as witnesses the individual never mentioned that he had not told his wife about the access authorization hearing. He apparently found it difficult during the prehearing conference to discuss his reasons for not telling his wife about the hearing. He also did not tell the EAP counselor that he had not told his wife about the access authorization hearing. Tr. at 57. The individual only disclosed that his wife was unaware of the access authorization hearing in response to a direct question from the DOE counsel at the very end of

the hearing. Tr. at 106. The individual's lack of candor suggests that he continues to find it difficult to be open and honest when explaining his behavior to the DOE.

In view of the foregoing, I have not been convinced that if there were to be derogatory information in the future that the individual would be candid with the DOE. Therefore, I find that the Criterion F concern has not been mitigated.

B. Criterion K

The individual contends that he was a recreational marijuana user in the 1970's and 1980's and has not used marijuana since 1986. If I were convinced that he was a recreational user in the 1970's and 1980's, that he has not used marijuana in 20 years and that he was committed not to using marijuana in the future, I would find that the criterion K security concern has been mitigated.

It is important to recognize that the fact that the marijuana use was self reported does not mean that the individual has accurately described his marijuana use. In order to demonstrate that he was a recreational user of marijuana and has not used marijuana since 1986, the individual provided his own testimony. In order to support his testimony, he brought forward co-workers, who testified that they do not believe he uses illegal drugs. He further submitted a note from his long term internist, stating that he has never seen an indication of drug abuse. He also submitted the results of his marijuana hair test indicating he has not used marijuana for the last 90 days. Finally, the EAP testified that she believed the individual's testimony. She testified that during their five sessions the individual was open and candid about his marijuana use. She testified that he willingly submitted to a hair test, which indicated he has not used marijuana in the last ninety days. The EAP counselor concluded that the probability that the individual has used marijuana since 1986 is low.

I did not find convincing the testimony of the co-workers or the letter from the internist. The co-workers did not have any knowledge of the individual's behavior away from the job. Therefore, I did not find their testimony that the individual does not use marijuana to provide support for his claim that he has not used marijuana since 1986. The letter from the internist merely states that there is no indication of substance abuse. The letter does not provide any background information that would indicate the basis for the conclusion. Finally, the result from the hair test is limited to the individual use of marijuana in the last 90 days.

I also was not convinced by the EAP counselor's testimony because I believe she may not have had complete information. In this regard, I note that the individual neglected to inform the EAP counselor that he had not told his wife about the access authorization hearing. In my view this failure is significant. Further, I believe the individual's own testimony and the counselor's testimony are outweighed by the individual's failure to bring forward testimony from friends and family who could provide information about his social activities and whether those activities included the use of marijuana. The testimony indicated the individual's wife smoked marijuana with the individual in the 1980's. She could clearly have provided testimony about his historic use of marijuana. The individual clearly understood that it was his obligation to bring forward testimony to corroborate his statement that he has not used marijuana since 1986. His failure to present any testimony from his family and friends causes me to doubt his willingness to provide complete and accurate information.

His stated reason for not telling his wife about the access authorization hearing is that it would cause her stress. I find that reason and his failure to tell the EAP counselor that he had not told his wife about the hearing to be self serving; this leads me to conclude the individual is not being fully candid about his reasons for not providing additional information about his social life.

Accordingly, I have not been convinced that he has not used marijuana since 1986, and I do not find the Criterion K security concern has been mitigated.

VI. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concern under Criteria F and K of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wicker
Hearing Officer
Office of Hearings and Appeals

Date: July 29, 2005